



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: The Defense Logistics Agency--Request for  
Reconsideration  
File: B-227055.2  
Date: October 16, 1987

### DIGEST

1. General Accounting Office affirms prior decision in which it reviewed, and sustained, a challenge to a contracting agency's decision to solicit competitive proposals instead of sealed bids. The Competition in Contracting Act of 1984 (CICA) did not leave to the complete discretion of the contracting officer which competitive procedure to use, but provides in determining which procedure is appropriate under the circumstances that sealed bids "shall" be solicited where four criteria are met, all of which were present here.

2. General Accounting Office affirms a prior decision awarding protester costs of filing and pursuing its protest, which successfully challenged the use of competitive negotiations versus sealed bids, since such award is consistent with the broad purpose of CICA to increase and enhance competition on federal procurements.

### DECISION

The Defense Logistics Agency (DLA) requests reconsideration of our decision sustaining the protest of ARO Corporation, ARO Corporation, B-227055, Aug. 17, 1987, 87-2 C.P.D. ¶ 165. We found that DLA's method of acquiring hand operated grease lubricating bucket pumps, under request for proposals (RFP) No. DLA700-87-R-1609, was improper. We ruled that DLA's decision to negotiate, requesting competitive proposals instead of sealed bids, was not proper when based solely on the agency's alleged need for price discussions, where the record did not show such discussions were necessary. We also found that ARO was entitled to the costs of filing and pursuing its protest.

DLA argues that our Office erred in its application of the requirements of the Competition in Contracting Act of 1984 (CICA) concerning the determination of whether competitive proposals, rather than sealed bids, should be solicited.

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DLA also argues that the award of protest costs was in error.

We affirm our prior decision.

In sustaining the protest, we noted that the pumps were being procured through a Commercial Item Description and were identified by a national stock number. Technical proposals were not required and relative technical merit was not a consideration in proposal evaluation, which was limited to price. We found that even though there was a wide range in prices on the 1985 procurement, DLA had made the award, without discussions, at a price that DLA apparently considered fair and reasonable. We concluded that this prior experience under the 1985 RFP was not indicative of the need to conduct price discussions under the current procurement in order to assure a fair and reasonable price. We therefore found that DLA's stated need to conduct price discussions lacked a reasonable basis and recommended that DLA cancel the RFP and resolicit through sealed bidding, as required by CICA, since all four of the conditions requiring sealed bidding were present.

DLA contends that we erred in applying the requirements of CICA, and the provisions of the Federal Acquisition Regulation (FAR) which implement it, in that in our decision we attempted to reimpose the pre-CICA determinations and findings procedures which were a prerequisite to the use of competitive proposals. To the contrary, the agency maintains, in removing the restriction from, and the written justification required for, competitive proposals, Congress intended to leave to the complete discretion of the contracting officer the question of which competitive procedure, sealed bidding or competitive proposals, is appropriate under the circumstances.

We think DLA's position is untenable. It is true, as DLA points out, that CICA eliminates the specific preference for formally advertised procurements ("sealed bids") and directs an agency to use the competitive procedures, or combination of procedures, that is best suited under the circumstances of the procurement. However, CICA, 10 U.S.C. § 2304(a)(2) (Supp. III 1985), does provide, in determining which competitive procedure is appropriate under the circumstances, that an agency "shall solicit sealed bids if": (1) time permits, (2) award will be based on price, (3) discussions are not necessary, and (4) more than one bid is expected to be submitted. As is evident, the plain language

of the CICA provision is mandatory in nature.<sup>1/</sup> When the enumerated statutory conditions are present, the solicitation of sealed bids is, therefore, required, leaving no room for the exercise of discretion by the contracting officer in determining which competitive procedure to use. Contrary to DLA's suggestion that the contracting officer's determination, if documented, is not reviewable by our Office, we consider it to be no different from any other determination the reasonableness of which we review pursuant to the exercise of our bid protest authority to assure that contracting agencies' actions are consistent with CICA and the FAR. See 31 U.S.C. § 3554(b)(1) (Supp. III 1985).

DLA also argues that we erred in awarding ARO its costs of filing and pursuing its protest since we recommended that the RFP be canceled and that DLA resolicit requesting sealed bids. Our Bid Protest Regulations, 4 C.F.R. § 21.6(e) (1987), limit the recovery of protest costs to situations where the contracting agency has unreasonably excluded the protester from the procurement, unless we recommend that the contract be awarded to the protester and the protester actually receives the award. We have interpreted this to allow recovery of the costs of protesting solicitation defects, such as restrictive specifications and improper

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<sup>1/</sup> The legislative history of CICA also indicates the mandatory nature of the requirement to use sealed bidding when the statutory conditions are present. Senate Report No. 98-50, 98th Cong. 2nd Sess., reprinted in 1984 U.S. Code Cong. & Admin. News 2191, states, in pertinent part:

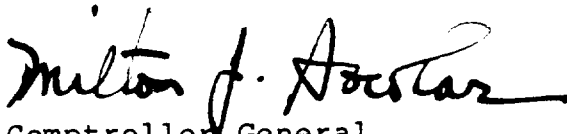
"While competitive negotiation is recognized in S. 338 as a bona fide competitive procedure, the Committee emphasizes that traditional formal advertising procedures are by no means cast aside. In fact, agencies are required . . . to solicit sealed bids [when the enumerated conditions are present] . . . ." (Emphasis supplied.)

House Conference Report No. 98-861, 98th Cong. 2nd Sess., reprinted in 1984 U.S. Code Cong. & Admin. News 2110, states:

"In effect, the substitute, like the Senate amendment, removes the restriction from--and written justification required for--competitive proposal procedures and places them on a par with sealed bid procedures. The substitute maintains minimum criteria for sealed bid procedures to ensure their use when appropriate." (Emphasis supplied.)

sole source awards, even when we also recommend that a new procurement be conducted under which the protester will have the opportunity to compete. See AT&T Information Systems, Inc., B-223914, Oct. 23, 1986, 66 Comp. Gen. \_\_\_\_\_, 86-2 C.P.D. ¶ 447; Washington National Arena Limited Partnership, 65 Comp. Gen. 25 (1985), 85-2 C.P.D. ¶ 35; Southern Technologies, Inc., B-224328, Jan. 9, 1987, 87-1 C.P.D. ¶ 42. The rationale for the award of protest costs here is similar. We consider the incentive of recovering the costs of protesting an improper use of competitive proposal procedures, when the conditions requiring sealed bid procedures are present, to be consistent with the broad purpose of CICA to increase and enhance competition on federal procurements.

Our prior decision is affirmed.

A handwritten signature in black ink, reading "Milton J. Astor". The signature is fluid and cursive, with a long horizontal stroke at the end.

Acting Comptroller General  
of the United States